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No. 78-1529

In the Supreme Court of the United States

OCTOBER TERM, 1978

N. B. HUNT, ET AL., PETITIONERS

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. The Commodity Futures Trading Commission is authorized by 7 U.S.C. 13a-1 to file an action in any district court seeking an injunction against any person who has engaged, is engaging or is about to engage, in any violation of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.* Actions of this type were intended by Congress to be used to bring violations to a prompt halt. H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 68 (1974). The Commission also is authorized to institute administrative proceedings against alleged violators. 7 U.S.C. 9. Administrative proceedings under this section can lead to sanctions such as prohibition of violators from trading; the Commission also can impose penalties of

as much as $100,000 for each violation. These sanctions, which are subject to review by appropriate courts of appeals (7 U.S.C. 9), serve to deter future violations of the Act and to disable proven violators from repeating their offenses.

The Commission instituted an administrative proceeding on November 28, 1977, to determine whether petitioners' dealings in soybean futures violated the Commission's limits on the maximum size of speculative holdings. On April 28, 1977, the Commission also had filed suit seeking an injunction against petitioners' activities with respect to soybeans. The complaint in that suit alleged that petitioners had been exceeding the limit of 3 million bushels of soybean futures contracts that any person or affiliated group could hold. See 7 U.S.C. 6a(1) and 17 C.F.R. 150.4.

In the civil action the district court concluded that petitioners were violating the Act and regulation in issue. The court declined to issue an injunction, finding the probability of future violations slight. The court of appeals upheld the validity of 17 C.F.R. 150.4, affirmed the district court's finding that petitioners had violated the rule, and remanded for both the entry of an injunction and further consideration of the Commission's request that petitioners be required to disgorge their profits. *CFTC* v. *Hunt*, 591 F. 2d 1211 (7th Cir. 1979) (reprinted at Pet. App. 32a-73a).

On December 13, 1977, petitioners filed the instant suit, seeking an injunction against continuation of the Commission's administrative proceeding. Petitioners argued that the Commission must elect between judicial and administrative remedies for violations of the Act; having filed the civil suit first, the Commission was barred from taking administrative action, petitioners argued. Petitioners also objected to the use of the judicial proceedings to collect evidence that would be used in the administrative proceedings.[1]

The district court denied the request for relief, and the court of appeals affirmed (591 F. 2d 1234; Pet. App. 1a-18a). The court of appeals concluded that petitioners' suit is premature because they have not exhausted their administrative remedies. The argument that the filing of a civil suit precluded administrative action should be presented to and resolved by the Commission, the court held. It pointed out that there would be ample opportunity for judicial review if the Commission should resolve petitioners' arguments against them and enter any order that aggrieved petitioners.

2. The decision of the court of appeals, on which we generally rely, is correct. It applies established principles to the facts of this case. There is no conflict among the circuits concerning the application of the exhaustion doctrine to proceedings of the Commission, and there is no need for review by this Court.

"[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Petitioners have an administrative remedy: they can present their arguments to the Commission. And if the Commission rejects them, petitioners have a right to full judicial review. 7 U.S.C. 9. That is fatal to petitioners' attempt to obtain judicial review in advance

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[1]The Commission plans to make substantial use of the judicial record in the administrative proceedings. The administrative proceeding is pending before an administrative law judge.

of the administrative decision.[2] See also *McKart* v. *United States*, 395 U.S. 185, 194 (1969).

Petitioners attempt to avoid the exhaustion rule by arguing that the Commission's administrative proceedings "clearly" are foreclosed. But if petitioners are right that the Commission clearly is in error, then petitioners suffer no harm from carrying on with the administrative proceedings: a court is sure to vindicate them in the end, if the Commission persists in its asserted error.

Petitioners' reliance on cases such as *California* v. *FPC*, 369 U.S. 482 (1962), and *Mathews* v. *Diaz*, 426 U.S. 67 (1976), for the proposition that complaining parties need not exhaust their administrative remedies on questions that may be characterized as "legal" is unwarranted. *California* involved review of an antitrust issue lying outside the expertise of the affected agency. *Diaz* and similar cases involved the constitutionality of the very statute the agency was charged with administering. The agency had declined to examine the constitutionality of its own statute, and as a result the administrative proceedings came to an end. Here, however, the administrative proceedings are not at an end; they are just beginning. Petitioners do not raise a collateral issue outside the Commission's province; they challenge the proceeding itself. In these circumstances, "all questions of the jurisdiction of the [Commission] and the regularity of its proceedings, all questions of

[2]Petitioners suggest (Pet. 21) that 7 U.S.C. 9 limits judicial review to the facts found by the Commission and forecloses review of legal matters. But nothing in the statute expressly precludes review of legal matters, and review is not inconsistent with the statutory scheme. Review is therefore fully available. See 5 U.S.C. 702.

constitutional right or statutory authority, are open to examination by the court" after completion of the administrative proceeding. *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, 303 U.S. at 49.

At all events, there is no clear error or any other pressing reason calling for judicial review. Section 6c of the Act, 7 U.S.C. 13a-1, on which petitioners rely as the basis for their argument that the Commission must elect between remedies, provides nothing of the sort. Section 6c authorizes the Commission to seek injunctions against violations of the Act and states that "[i]n lieu of bringing actions itself *pursuant to this section*, the Commission may request the Attorney General to bring the action" (emphasis added). Section 6c thus does establish an election: the Commission may elect to request election has nothing to do with the kind of election petitioners seek between judicial and administrative proceedings.

Parallel judicial and administrative proceedings are consistent with the purposes of the Act. Judicial relief can put a prompt halt to ongoing violations. Cf. *Parklane Hosiery Co.* v. *Shore*, No. 77-1305 (Jan. 9, 1979). Administrative action can supply penalties (civil fines and suspension from trading) not authorized in the injunctive actions, which usually have a more limited purpose. And although, as petitioners remark, the administrative and judicial proceedings in some cases could come to different conclusions about the culpability of the persons charged with wrongdoing, the differences often may be justified by the different purposes of the remedies. What is more, the judicial branch always has the last word, on review under 7 U.S.C. 9.

There is nothing unfamiliar in what the Commission is doing. The National Labor Relations Board long has had the power to seek injunctions under Section 10(j) and (*l*) of the National Labor Relations Act, 29 U.S.C. 160(j) and (*l*), at the same time as it commences proceedings on administrative charges of unfair labor practices. The Federal Trade Commission also is authorized to bring parallel judicial and administrative proceedings (see 15 U.S.C. 45, 53, 56, 57a, 57b), as is the Securities and Exchange Commission (see 15 U.S.C. 77t(b)). Congress recently rejected a proposed amendment to the Act that would have required the Commission to elect between judicial and administrative remedies. See H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. 51 (1978). Petitioners' request that the courts read into the Act "what Congress has studiously omitted" should be rejected. *Great Atlantic & Pacific Tea Co.* v. *FTC*, No. 77-654 (Feb. 22, 1979), slip op. 8-9.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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